Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-1370

ARKANSAS WRITERS' PROJECT, INC. ..... *Appellant*

vs.

CHARLES D. RAGLAND, COMMISSIONER
OF REVENUE OF THE STATE OF ARKANSAS ..... *Appellee*

ON APPEAL FROM
THE SUPREME COURT OF ARKANSAS

MOTION TO DISMISS STATE CIVIL CASE

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FORMS MANAGEMENT COMPANY

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APPELLEE'S MOTION TO DISMISS

Appellee, pursuant to Rule 16.1 (d) moves the Court to dismiss the appeal herein or, in the alternative, to affirm the Judgment of the Supreme Court of Arkansas on the ground it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

OPINIONS BELOW

The opinions and orders in prior court proceedings have been adequately set forth in the Appellant's Jurisdictional Statement and nothing further is added here.

JURISDICTION

Jurisdiction is properly being sought under 28 USC §1257 (2) but Appellee respectfully urges that Appellant's appeal be denied since a decision of this Court is not warranted in this matter.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provisions upon which Appellant relies, have been set forth on page 3 of Appellant's Jurisdictional Statement. One of those provisions is the Privileges and Immunities Clause. Citation of that clause is evidence of Appellant's pell mell approach in this case. Appellant is a corporation. As such, it has no standing to challenge any law under the Privileges and Immunities Clause. *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization of Calif.*, 451 U.S. 648 (1981); *Hemphill* v. *Orloff*, 277 U.S. 537 (1928).

The Arkansas Gross Receipts (Sales) Tax Act (Ark. Stat. Ann. §84-1901 et seq.) levies a General Excise Tax (by §84-1903) on the gross receipts derived from all sales of tangible personal property, subject only to certain exemptions from tax set forth in Ark. Stat. Ann. §84-1904 which, for the purposes of this appeal, include:

> "(f) Gross Receipts or Gross Proceeds derived from the sale of newspapers . . ."
>
> "(j) Gross Receipts or Gross Proceeds derived from the sale of religious, professional, trade and sports journals and/or publications published and printed within this State and when sold through regular subscriptions."

STATEMENT OF THE CASE

Appellant does not argue that Appellee cannot subject the sale of all tangible personal property to a sales tax under §84-1903. Rather, it contends that the failure to extend the exemptions for newspapers [§84-1904 (f)] and religious, professional, trade and sports publications [§84-1904 (j)], violates Appellant's rights under the First Amendment to the U.S. Constitution. Appellant has stipulated that its publication, Arkansas Times' Magazine, is not a newspaper or a religious, professional, trade or sports publication. Despite arguing that the exemptions under §84-1904 (f) and (j) are unconstitutional, Appellant nevertheless claims entitlement to the same exemptions.

The Arkansas Supreme Court in its November 18, 1985 Supplementary Opinion succinctly disposed of Appellant's constitutional contentions. With respect to the Appellant's claim that to exempt certain publications from sales tax while taxing the sale of others is unconstitutional, the Arkansas Supreme Court stated:

> "We need not explore this point, for it would avail the Appellee nothing if it wins its argument. The legislature has levied a valid sales tax that is applicable to the *Times*. It is immaterial that an exemption in favor of some other taxpayer may be invalid, as discriminatory. If so, it is the exemption that would fall, not the tax against the *Times*. The Courts cannot create a tax exemption; that must be done by the legislature. It has not exempted the *Times*."

With respect to Appellant's argument that the tax on the sale of the *Times* is an infringement upon its freedom of speech and of the press, the Arkansas Supreme Court stated:

> "*Grosjean* supplied the answer to Appellee's con-

tention. The Court said that the owners of newspapers are not immune from any of the ordinary forms of taxation for support of the government. That statement applies with even greater force to the *Times*, a monthly magazine publishing matters of general interest. Certainly the *Times* has no greater claim to tax exemptions than has, say, a publisher of books. Both are exercising First Amendment rights, but it would not be seriously argued that they are exempt from income taxes, property taxes and other exactions levied to pay the costs of government. No authority has been cited applying a different rule to the sales tax; we are confident that no such authority exists."

THE FEDERAL QUESTION

Appellant has adroitly intertwined its First and Fourteenth Amendment arguments in recognition of the fact that neither, standing alone, will benefit Appellant to the extent of allowing a refund of the sales tax at issue in this appeal. If in fact there is a differential in taxation by virtue of the exemptions, then the exemptions themselves would be stricken and the sale of Appellant's magazine still subject to the lawfully imposed sales tax. This being an undesired result, Appellant has merged arguments. While setting up the classic argument of different classifications, Appellant advances that as grounds for its First Amendment violation. Appellant has not been subjected to a special tax as was at issue in *Minnesota Star and Tribune Company* v. *Minnesota Commissioner of Revenues*, 260 U.S. 575 (1983). The press is not automatically immune from a general sales tax. *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936). Only a special tax which is imposed solely against the press is invalid under the First Amendment according to *Minnesota Star*.

The decision below of the Arkansas Supreme Court did

not approve of, as Appellant claims, a differential system of taxation of publications in Arkansas. What the decision below reflects is that Arkansas imposed a general tax on sales of all items which included all publications save those specifically exempt under Ark. Stat. Ann. §84-1904 (f) and (j). Appellant has admitted its publication does not fall within these two exemptions. Even though the thrust of the Appellant's argument is that the exemptions result in a differential system of taxation on publications and are therefore unconstitutional, Appellant still wants the benefit of the exemptions. If there is any violation of the U.S. Constitution, it is by virtue of the exemptions and therefore the exemptions must fall. ***BUT***, such is not the relief Appellant desires from this Court. Should the exemptions fall, Appellant's publication is still subject to the general sales tax and Appellant's claim for a refund of taxes totally without merit.

CONCLUSION

The Arkansas Supreme Court correctly perceived the issue in this case. Since Appellant admitted its magazine was not within the classes of exempt publications under Arkansas Law, there could not be a refund of taxes as prayed for by Appellant. Due to the lack of a substantial question involving these parties, this appeal should be denied review and Appellee's Motion to Dismiss should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served three copies of the foregoing Motion to Dismiss on John R. Clayton, Attorney for appellant, at House, Wallace, Nelson & Jewell, P.A., 1500 Tower Building, Little Rock, Arkansas 72201, by placing same in the U.S. Mail, First Class, Postage Prepaid, this 24th day of April, 1986. There are no other parties to the proceeding.

/s/ Joseph V. Svoboda